UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. 22 CR 590 (PKC)
15 CR 723 (PKC)

OKAMI LANDA,

Conference

Defendant.

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New York, N.Y.
June 27, 2023
12:00 p.m.

Before:

HON. P. KEVIN CASTEL,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
MATTHEW HELLMAN
NICHOLAS BRADLEY
Assistant United States Attorneys

DAVID PATTON
FEDERAL DEFENDERS OF NEW YORK, INC.
Attorney for Defendant
BY: MICHAEL ARTHUS

Also Present:

Jonathan Bressor, U.S. Probation
Jill Hoskins, Spanish Interpreter

(Case called)

MR. BRADLEY: Good afternoon, your Honor. Nicholas Bradley, for the government, along with Matthew Hellman. And also at counsel table is Jonathan Bressor, from the United States Probation Office.

THE COURT: Good to see you all.

And for the defendant?

MR. ARTHUS: For Mr. Landa, Michael Arthus, Federal Defenders. Good afternoon.

THE COURT: Good afternoon, Mr. Arthus.

And good afternoon, Mr. Landa.

So the first order of business: With regard to the motion to suppress, does the defendant seek an evidentiary hearing?

MR. ARTHUS: There doesn't appear to be any factual dispute in the motion, so, no.

THE COURT: And that's the view of the government as well?

MR. BRADLEY: Yes, your Honor.

THE COURT: All right.

I can see why you reached that conclusion. Based on my review, it seems that the parties are pretty close on this.

There are a number of moving parts on the motion to suppress. It is well established that there is an exception to the warrant requirement in circumstances of special needs

beyond the normal need for law enforcement, and the special needs exception would apply to a person on supervised release, particularly where there has been a search condition, and, as I understand it, there was a search condition in the judgment that was entered arising out of the 2016 conviction.

So the question becomes — at least we're not up to the search warrants yet, but we're up to the initial search — whether the officer, the probation officer, had, based on the totality of the circumstances, a reasonable suspicion. And that requires an analysis of whether there was a particularized and objective basis to suspect the person searched of criminal activity. And a mere hunch is insufficient, but the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance-of-the-evidence standard.

So, Mr. Arthus, this is what I propose to do. I want to see whether this makes sense to you, it makes sense to the government.

The first thing I'm going to do is have the government lay out the basis for reasonable suspicion leading to the initial search by the probation officer, and to describe the fruits of that search, what it was and what it showed. I'll then give Mr. Arthus an opportunity to respond, and we can then move on to similar inquiries with regard to the search warrant.

Does that make sense to you, Mr. Arthus?

MR. ARTHUS: That makes sense.

The only note I would make: I wasn't certain, coming in, that we were actually going to be having oral argument today, so I'm not wholly -- I can try.

THE COURT: All right. Excellent.

So let me hear from the government.

MR. BRADLEY: Yes, your Honor.

And I will just note for the record that what I am about to lay out in terms of the undisputed facts that were within the knowledge of the probation officer are set forth in the government's opposition brief, specifically pages 12 to 13, again, just for the transcript.

But at the time of the probation search of the defendant's apartment, which the government referred to as the residence in the Bronx, it's undisputed that the probation office knew the following facts:

First, that an FBI agent in the sex crimes unit of the New York field office of the FBI received a letter on or about November 15th, 2021, containing threatening language and a white powder substance. The stamp that was used to send that letter was purchased using a credit card belonging to the defendant's mother, who lived with the defendant at the residence. That information was also known to the probation officer and the probation office due to the defendant's supervision, that he was registered specifically at that

residence with his mother.

Next, that the FBI interviewed the defendant at his residence regarding the letter, and in the FBI interviewing agent's assessment, the defendant's explanation regarding provenance of the stamp did not make sense.

Next, your Honor --

THE COURT: He said that his mother had purchased the stamp and gave it to someone who she didn't know? Was that the explanation?

MR. BRADLEY: That's correct, your Honor. Yes, in general, that was the effect.

There was also discussion about the location of where the stamp was purchased, and, again, the FBI agent had also noted that that particular location that was proffered by the defendant did not make sense as well.

THE COURT: All right.

It did not make sense because it didn't match up with what the credit card showed?

MR. BRADLEY: Correct, your Honor, the purchase records associated with that stamp on it.

THE COURT: Okay. So I'm processing this. That's a very tangible discrepancy.

So the agent knew where the stamp was purchased from the credit card receipt. That's what you're proffering?

MR. BRADLEY: That's correct.

THE COURT: And the place where the defendant said the stamp was purchased did not match that record?

MR. BRADLEY: Correct, your Honor.

THE COURT: Okay. Go ahead.

MR. BRADLEY: And the bottom line is that what the probation office was told from the FBI was that the defendant's explanation regarding the stamp did not make sense in the FBI's assessment.

THE COURT: Right.

MR. BRADLEY: And then next, your Honor, that the probation officer was aware at the time that the defendant had previously made threats against the United States Government, including statements regarding blowing up Federal Plaza, which is the location of the New York field office of the FBI.

And, finally, the probation office -- obviously, the probation officer obviously knew that the defendant was subject to a search condition under his terms of supervised release --

THE COURT: Let me just ask a question about the prior threat.

That was learned from the Bureau of Prisons? Is that how he learned it?

MR. BRADLEY: That's correct, your Honor.

THE COURT: And how, in the ordinary course, would the probation officer know that?

MR. BRADLEY: That information was communicated to law

enforcement from the Bureau of Prisons as, frankly, a security measure, after it was made, because at the time the defendant made the statement, and I believe this is reflected in one of the exhibits that Mr. Arthus attached to the severance motion, the defendant was coming up to either his halfway house placement or the conclusion of his term of imprisonment on his prior case.

THE COURT: So the BOP alerted, what, the FBI, and the FBI told the probation office? Is that the chain of communication? Or was it from the BOP directly to the probation officer?

MR. BRADLEY: If I may, your Honor?

THE COURT: Yes.

(Pause)

MR. BRADLEY: Your Honor, that information came directly from the Bureau of Prisons to the probation office.

THE COURT: Okay. Excellent. Thank you.

MR. BRADLEY: That is the total mix of information that was available and known to the probation officer at the time of the search. That probation search, pursuant to the search condition, occurred on November 30th of 2021. The results or the fruits of that search, your Honor, included, among other things, an orange prescription bottle containing a powder substance, also two standard business size envelopes, a Dell laptop, and also the SanDisk brand USB drive. That USB

drive was later searched by what was the subject of what the government referred to as the devices warrant in which the FBI subsequently determined it contained CSAM.

THE COURT: Anything else on reasonable suspicion for the residence search?

MR. BRADLEY: No, your Honor.

THE COURT: All right.

Mr. Arthus? And I am familiar with your papers, so --

MR. ARTHUS: Yes. Just to summarize, I'll give it a very brief summary here.

THE COURT: Yes.

MR. ARTHUS: As the Court said, it's all laid out in the papers.

The statute here that the search was conducted as a violation of, the false information and hoaxes, requires that there actually be the conveying of false information about — and the statute has like a hundred different subsections, but the relevant one here is bioterrorism. The government's theory here is that it was anthrax that was in the envelope or fake anthrax that was in the envelope.

But the actual language of the letter here — and that's what makes this different from so many other cases that the government relied on — the actual language of the letter identifies what the substance is supposed to supposedly be, which is cocaine, and that does not violate the false

information and hoaxes statute. I want to be crystal clear on this. No one is saying that this was a good or appropriate letter to send — I think I was pretty explicit in my motion about how distasteful this letter was — but at the time, there was no reasonable suspicion that it violated the laws that probation felt that it violated.

So, in that respect, there was then no reasonable suspicion to conduct a search because a probationer has reduced expectations of privacy, but the act of sending a distasteful letter does not authorize probation to then search someone's apartment.

So that's the summary of the reasonable suspicion argument.

THE COURT: All right. Let me pause --

MR. ARTHUS: Sure.

THE COURT: -- because this is kind of the 800-pound gorilla here.

MR. ARTHUS: Sure.

THE COURT: In the context of the information that was known from the Bureau of Prisons about the prior threat, and in the context of the statement that — and I'm eliding language that's not necessary here — hope you and your ugly children and family get what you deserve, a slow, painful and terminal disease to end your sorry life, and then it says: Happy New Year. Here is some snow/sugar for your nose, you corrupt, ugly

blank.

So that is stated. And as I understand the argument — and I get it, I think — it's didn't you read what he said? Snow is slang for cocaine. He told you it's cocaine. So what on earth gives you reasonable suspicion of anything else?

MR. ARTHUS: Yes, because what has to be established is both that he intended to convey false information, so actually saying what was -- it was supposed to be goes to his intent. It also goes to the ability of someone to reasonably believe what was in there was actually --

THE COURT: So now let's think about this.

You're a special agent of the FBI, and you receive this. And in the context of the prior threats, why on earth would you, a special agent of the FBI, take at face value the writer's claim that this is cocaine or sugar? Why would you take it at face value?

MR. ARTHUS: I would have two responses to that.

The first, I don't think that there's been an allegation from the government that the special agent at the FBI knew about the prior threats, or at least I haven't seen that that was explicitly communicated to him. Correct me if I am wrong, but I believe that was communicated during the course of the investigation from probation to the FBI. I don't believe that the special agent, when he opened it, knew about those prior threats, at least I haven't seen that, but that

could be -- either way, the fact is — and this comes up in the white powder cases, and this is the whole context of white powder — sending white powder is not criminal, per se, and that would effectively convert any sending of white powder into a crime, and that's not here.

THE COURT: No, but it's the false hoax thing.

MR. ARTHUS: Yes. So if I send an envelope with white powder, and I say this is white powder, this is just white powder, it's not anthrax, a person could believe that it's anthrax, but that would not be a reasonable position.

THE COURT: So this is kind of my hypothetical.

MR. ARTHUS: Yes.

THE COURT: So what if the letter said, I want you to know, Mr. Special Agent, who I wish a painful and early death to, that this is cocaine (it's definitely not anthrax...it's cocaine), you maintain that that does not violate the federal hoax statute?

MR. ARTHUS: Absolutely, because there is then no circumstance under which you could send someone white powder that it was not a violation of that statute, and that if that was what the statute is supposed to be, Congress would have passed a law saying sending white powder is illegal. That's not what this was.

THE COURT: Okay, I get the argument. I get the argument. That's the argument. Okay.

Let me say, as we go through this, because I think it's appropriate, I find, on the totality of the circumstances, that there was a particularized and objective basis, on the part of the probation officer, to suspect the defendant of criminal activity. It was more than a mere hunch, and it was particularized.

The probation officer knew of the threats communicated by the defendant and was known to the Bureau of Prisons. And the probation officer knew of the letter and the existence of a white powder in that letter to the special agent of the FBI, and could reasonably suspect — he doesn't need to reasonably conclude, but reasonably suspects — that the intent of the communication was to communicate that a harmful biological material, known as anthrax, was in the envelope, and that the probation officer would be quite appropriately skeptical of a claim by the defendant that this is not biological material, this is not anthrax, this is cocaine.

So I conclude that there was, in the view of the search condition that existed in the 2016 judgment of conviction, a basis for reasonable suspicion to conduct the search of Mr. Landa's residence at that time.

Now, let me hear the government with regard to the first search warrant.

MR. BRADLEY: Thank you, your Honor.

With regard to the search warrants, there were three

of them in total, the first -- it may make sense to talk about the first two because they were --

THE COURT: Okay, that's fine.

MR. BRADLEY: -- sworn out on the same day, your Honor. But, in general, the two search warrants set forth probable cause based off of facts that were largely set forth in the government's opposition brief. But, in general, the facts were that, much as I summarized earlier regarding the probation search, there was a letter with powder that was threatening, and the text and photograph of that letter was included in the search warrant affidavit. It was sent to a special agent who had previously been involved in an FBI investigation of the defendant.

The stamp on that letter, or that envelope, had been traced back to a credit card in the defendant's mother's name, and registered at the defendant's mother's address, where the defendant lived, and also described the results of the probation search that I mentioned earlier, including the recovery of a USB drive, the recovery of the laptop, also the envelopes, the powder substance in an orange bottle, and then, also, the defendant's statements to the probation officer at the time of the search admitting that he had been using his mother's laptop, in violation of his conditions of supervised release.

THE COURT: When did that admission took place?

MR. BRADLEY: That took place during the probation search, your Honor, on November 30th of 2021.

In addition to that, your Honor, the affidavit -- I mention all this in the context of what we describe as the premises search warrant, but the affidavit also described how, during the probation search, the probation officers observed, documented, but did not seize, additional evidence that included printing cartridges and also a typewriter. And, obviously, at the time, the government and the FBI was continuing its investigation of the provenance of the threatening letter that was sent to the FBI agent.

Those facts are essentially repeated in their entirety with regard to the laptop and USB drive warrant, including the fact that, as I mentioned earlier, the defendant had admitted during the probation search that he had been using electronic devices in violation of his probation conditions.

THE COURT: Okay.

So now, Attachment A describes the devices subject to search and seizure on the device warrant. This is the warrant of — let me get the date of this.

MR. BRADLEY: I believe it's December 3rd, 2021, your Honor.

THE COURT: Okay.

Now, what is the warrant of December 17th, then?

MR. BRADLEY: The December 17th warrant, your Honor,

which the government referred to as the devices warrant, was a separate --

THE COURT: So the December 3rd also seems to be a devices warrant.

MR. BRADLEY: Correct.

THE COURT: So they're both devices warrants.

MR. BRADLEY: Correct. And just for context, your Honor, the December 3rd warrant was limited to the laptop, the Dell laptop, and the USB drive that were seized by the probation office during the probation search. And the December 17th --

THE COURT: I see.

So it was the black Dell Inspiron 3502 laptop and the black SanDisk USB thumb drive?

MR. BRADLEY: Correct, your Honor.

THE COURT: And it was in the possession of law enforcement, but, prudentially, you were securing a search warrant to be able to examine the contents?

MR. BRADLEY: Correct, your Honor.

THE COURT: All right.

Now take that to December 17, which also refers to the Dell Inspiron and the black SanDisk USB along with other things.

MR. BRADLEY: That's correct, your Honor. In that case, the additional devices, on top of the laptop and USB

drive, were various electronic devices that were seized by the FBI during the premises search warrant pursuant to the December 6th --

THE COURT: December 3rd.

MR. BRADLEY: -- excuse me, December 3rd search warrant.

That search, as set forth in the --

THE COURT: I see.

So you now have additional searchable data storage devices that have been seized as a result of the December 3 search warrant. So there actually was a physical search above and beyond just the Dell laptop and the USB drive that resulted from the December 3 warrant; is that correct?

MR. BRADLEY: That's correct, your Honor.

And, again, just so the record is clear, there were two search warrants that were sworn out on December 3rd.

THE COURT: I see.

MR. BRADLEY: The first was for the defendant's residence.

THE COURT: I see.

MR. BRADLEY: That was a premises search warrant.

And the second was for those two electronic devices that were mentioned.

THE COURT: I see now.

And let me just look at the description of the place

to be searched and what was being searched for.

There's a photograph of the apartment door, 6J, et cetera, and a description of that which they were seeking. Okay.

So now there is the December 17 warrant. Was that devices only, or device and residence?

MR. BRADLEY: That was devices only, your Honor. It was limited to not only the laptop and USB, which I'll get to in a moment, but also the additional devices, including an iPad, another tablet device, multiple cell phones, and digital cameras that were seized during the search pursuant -- of the residence pursuant to the December 3rd warrant.

I should note, your Honor, that that warrant, and the reason why the laptop and the USB drive appeared again in that December 17th warrant, was to add an additional probable cause for an additional offense, specifically because the FBI's search of the thumb drive, the USB drive, on December 3rd uncovered evidence of CSAM, which is set forth in the December 17th warrant.

THE COURT: So that's what was of particular note that was new in the December 17 warrant application?

MR. BRADLEY: Correct, your Honor.

THE COURT: Are those the three warrants, or is there an additional warrant beyond that?

MR. BRADLEY: Those are the three warrants, your

Honor.

THE COURT: All right.

So now let me turn to Mr. Arthus and give him an opportunity to expound.

MR. ARTHUS: We're starting with the apartment warrant, I'll begin with.

So, as the Court saw in the motion, there are several grounds that we raise. The initial one is that there was not probable cause to believe a crime had been committed. So, to the extent that the Court's previous ruling about the probation search relied on reasonable suspicion, obviously we have the same argument, but now saying that it doesn't rise to that higher probable cause standard.

Additionally, though, there are some interesting facts about that apartment warrant, including the fact that the apartment had already been searched by probation when that warrant was issued. And there are no fact-specific allegations in this warrant that justify thinking that probation missed anything during what was apparently a fairly thorough search.

Most of the warrant and most of all of these warrants are relying principally on the agent's, quote-unquote, training and experience. That's language that just is repeatedly used. And while that's certainly relevant to a search warrant application, it can't be the be all and end all. Agents can't just say in my training and experience, things have been hidden

in ceiling tiles before, therefore, we should be able to move the ceiling tiles in this apartment. In fact, there's no allegation in the warrant that probation did not move the ceiling tiles.

So the apartment search was largely seeking a warrant to conduct what was effectively a duplicative search of what probation had already done to look for additional evidence.

Also, I won't go into every single -- the Court has read the warrants and has read the motions, but it was also overbroad, and it lacked particularity, for the reasons we laid out. It was allowing, effectively, a roving search of things that could not possibly have been related to the false information and hoaxes charges.

So, that's the apartment warrant. Does the Court want me to move on to the USB warrant, just do it at all once?

THE COURT: That would be fine, yes.

MR. ARTHUS: So the USB warrant, in particular -- I'm going to call it the USB warrant because the USB is the main thing in this case.

THE COURT: Yes.

MR. ARTHUS: There are no fact-specific allegations here that the USB drive contained any evidence of false information or hoaxes. Again, it's all about training and experience. And even if we take that training and experience as meaningful, the allegation was that the USB drive might

contain personal information about the agent, but there's no reason to think that that personal information even existed on the internet. In fact, I've Googled Agent Spivak. There is no personal information about him on the internet that could possibly have existed on that USB drive.

THE COURT: But that assumes that any personal information about the agent necessarily must come from the internet.

MR. ARTHUS: I think that was the allegation in the warrant, was that he must have used the computer to research personal information about the agent and then saved it on the USB drive — that was one of the allegations — as well as the allegation that drafts of the letter might be saved on the USB drive. In that respect, the USB drive was not connected to the computer; it was found in a different area of the room. There is just no connection between the -- it's not even said in the warrant that the USB drive was actually compatible with that computer, so in that respect, there wasn't a basis to search the USB drive, as well as the fact that it was a fruit of what we had -- I just want to preserve that issue, that it was a fruit of the previous unlawful --

THE COURT: I understand the argument.

MR. ARTHUS: Yes.

And then the final devices warrant — again, I'm just giving the highlights here. This is obviously not everything

in our motion. The final devices warrant was effectively duplicative of the other warrant, so the same exact arguments go to the final devices warrant. It's effectively the same warrant, just adding in allegations related to child pornography at that point.

So the Court has all of our other arguments. I don't need to go into detail about everything that was in the motions.

THE COURT: Thank you.

And I understand the fruits argument applies to all three warrants?

MR. ARTHUS: Yes.

THE COURT: Yes.

I find that there was probable cause laid out in the application for the two warrants issued on December 3 by Magistrate Judge Debra Freeman. Specifically, it was not duplicative in the following respects: The training and experience of a special agent of the FBI is unique. There is no reason to believe that a probation officer — who is part of the judicial branch of government, works for the court, not for any special law enforcement agency — would have the same motivations or experience in conducting a search. Their job is to find and consider whether there has been a violation of the court-ordered terms of supervised release.

Now, that does include, and would include, the

violation of a federal, state, or local law. That could be a ground for violating the terms of supervised release. In contrast, the special agent of the FBI is investigating under a general criminal statute. And the three statutes that are cited are: 18 U.S.C. 875(c), interstate threats; 876(c), mailing a threatening communication; and 1038(a), false information and hoaxes. And the culmination of information, including what I have already outlined, gave rise to probable cause, and this was all before the magistrate judge, including the records of the United States Postal Inspection Service and the credit card, which gave law enforcement, and ultimately the magistrate judge, a basis to believe that Landa had given false information to law enforcement.

So that strikes me as sufficient in the totality of the circumstances laid out in the warrant.

And, further, with regard to the USB drive, the term "USB" almost defines itself. It is a recognized and common means of connecting to a port in commonly sold laptops. It would be like requiring a better explanation that an electrical plug goes into an electrical outlet or a telephone plug goes into a telephone jack. A USB drive is commonly understood to be insertable in most commonly sold laptop devices.

Looking at the premises or residence warrant, the location is particularized, the evidence that's being sought is being particularized, and that's true with the two device

warrants as well. Of course, when it comes to the second device warrant, at that point, the government had the fruits of the search of the USB drive and, therefore, had good probable cause to believe that there may be evidence of possession of child pornography on other electronic devices.

So, considering all of the arguments raised in defendant's papers, including those not addressed today, on the record, or in the Court's oral findings, the Court concludes that the motion to suppress is denied.

Now, there's a motion to sever.

The motion to sever proceeds from the premise that the defendant should have a separate trial of the false hoax charge separate from the child pornography charge. It argues that the two charges are not similar, and that it will be prejudicial to include them in the same indictment.

The government comes back and says, well, in the false hoax trial, it's inevitable that at least the prior conviction for child pornography will come out, and, of course, the defense says that's not necessarily inevitable. But I want to hear the parties on that point in particular and anything else you want to tell me on the severance motion. And I will let the government go first.

MR. BRADLEY: Thanks, your Honor.

I do want to answer the Court's question, but also just to place it in context.

THE COURT: That's fine.

MR. BRADLEY: Your Honor, unlike the cases that the defendant cited in his motion, many of which involve counts involving CSAM and then counts involving not CSAM, such as a gun possession or something along those lines, this is a case in which joinder is appropriate because, in the government's view, the evidence is inextricably intertwined. And it's part of the same core set of facts regarding the defendant's conduct, engaged out of the defendant's own apartment, in a short period of time, while he was on supervised release. The government certainly believes this meets the liberal standard of Rule 8(a), including that it meets the general likeness that's necessary to, for example, show a common plan.

The significant overlap in evidence reinforces the judicial economy in a joint trial that the public interest would serve here, and also the nonoverlapping evidence, the government believes, would be quite minimal. A combined trial, in the government's view, would probably take less than a week, your Honor.

With regard to the prior CSAM conviction specifically, it's a very good example. First of all, a lot of that, your Honor, coheres not just around the fact of the conviction, but also the defendant's statements to the FBI agent, who later received the powder letter back in 2015. As the Court knows from the government's opposition brief, that FBI agent

interviewed the defendant pursuant to a search warrant back in 2015.

During that search, the defendant engaged in a voluntary interview and made a number of statements that both admitted to his role in possessing CSAM, his preferences about consuming CSAM, what types of CSAM that he liked. He specifically said little girls. He also noted how he kept and organized it, and kept it alongside adult pornography, and also noted his interest in anime, which is a form of Japanese cartoons.

He also made statements to the FBI agent minimizing his role in the offense conduct and saying that he did not believe anything should happen to him, and that he also thought that because, in part, he should get a warning because he wasn't making any money off of this. So, in other words, he didn't believe he was hurting anyone, he should be left alone.

All of those facts, your Honor, the government respectfully believes should come in in both trials or with respect to both counts. With regard to the CSAM charges here, in 2021, it's clear from the defendant's opposition brief that the defendant has placed in issue his knowledge of the possession of the USB drive. The one fact that he placed in dispute was an affidavit he submitted, the defendant submitted, denying that he made any statements to Officer Bressor regarding the USB drive or any statements about his knowledge

of the USB drive.

So that knowledge on the CSAM count will be particularly important, both under Rule 414, in which the government can introduce it for any purpose, including propensity, but also Rule 404(b), to show --

THE COURT: For any purpose other than propensity, is that what you just said?

MR. BRADLEY: No, excuse me, including propensity under Rule 414(a). My apologies for misspeaking.

THE COURT: Right, okay.

MR. BRADLEY: And then, also, under Rule 404(b), with regard to knowledge, intent, and identity, including, for example, how it was kept, how it was stored, and what, for example, just to use one, your Honor, corroborating the fact that the CSAM on the USB drive in 2021 contained images of prepubescent girls, which is consistent with the statement that he made to the FBI agent back in 2015 regarding his specific preferences for CSAM. If, for example, it contained images of little boys, one could imagine that he could make an argument about that's not actually his USB drive or something to that effect.

With regard to the hoax count, your Honor, those statements to the FBI agent back in 2015 are also direct evidence of the defendant's knowledge, intent, and motivation in targeting the FBI and sending the letter to the FBI agent

with the powder in it and threatening him. How else would he know about that agent's identity? And, also, your Honor, also specifically corroborated by his statements that he believed that he, in effect, was not committing a crime and that he should be left alone.

That one example, your Honor, I believe is a very powerful indicator of why joinder is appropriate here and also how, in separate trials, the evidence would be sliced quite thin in order to offer or perhaps redact these statements and offer them for different purposes.

I also know, your Honor, that with regard to limiting instructions — and I know Mr. Arthus made a point about that — I believe that just recently as this week, the Supreme Court announced a decision in *Samia* in which Justice Thomas endorsed fullheartedly or wholeheartedly the fact that we must generally rely on jurors to follow instructions and that they generally do so. And, here, I don't believe that this is a particularly complicated set of facts or a particularly complicated fact pattern for the jury to consider.

I think the last point I'll offer, your Honor — and then, again, I'm certainly happy to answer any questions the Court may have or respond to any points that the Court believes appropriate with regard to Mr. Arthus' summation — with regard to the full set of facts at issue in this case, the government respectfully believes that this is not a situation in which,

for example, a case that Mr. Arthus cited in which a defendant is charged with simultaneous possession of a gun and CSAM. This is a case really, at its core, about the defendant's desire to obtain more CSAM, and it places his actions in context, not only that he's made statements expressing hostility to the U.S. Government, that he was prosecuted in the first place and that he shouldn't have been, that he believed that his possession of CSAM was not something that he should have been punished for, and the fact that, frankly, he sent the letter to the FBI agent involved in the prior investigation of him, that all shows, and is evidence of, the defendant's subsequent possession of CSAM in the instant case. Why else -- it places in context the defendant's actions and why he took the very significant actions that he did.

With regard to prejudice, your Honor, under Rule 14, the Court well knows that that prejudice must be substantial. And in a case such as this, your Honor, the defendant is already going to be tried on -- the evidence in this case will already show the defendant had a prior CSAM conviction. It's very difficult for the government to conceive a scenario in which that would not be the case. The fact that that's already happened and that bell has already been rung makes it very difficult for the defendant to maintain an argument that there is substantial prejudice on top of that.

So for those reasons, your Honor, and for the reasons

explained in the government's brief, the government respectfully believes that joinder is appropriate and that severance should be denied.

THE COURT: Thank you.

Mr. Arthus?

MR. ARTHUS: This may result in some mixing of the misjoinder and the prejudice because some of the arguments overlap.

THE COURT: Understood.

MR. ARTHUS: But what I still am unclear on is why the government is taking the position that if we took the hoax trial in a vacuum, right, the false information and hoaxes, why the words child pornography would ever be uttered at that trial. If the government's theory is that this letter was sent to an FBI agent because of lingering anger over a previous investigation, that would, in the normal course, be the evidence that was admitted. We would normally say child pornography is an extremely inflammatory allegation for a jury to learn about and it's not relevant to the false information and hoaxes charges, what the prior investigation was for, as much as simply the fact that there was a prior investigation.

THE COURT: I think that has some appeal to it, what you're arguing. What I'm hearing from the government — and maybe they're not arguing this — what I'm gathering is that this is not a situation where someone is angry that they were

prosecuted for a crime; they are arguing, or harbor this belief, that they did the acts that gave rise to the conviction, but believe that they are lawful acts. And it puts it in a different type of motivation than a garden-variety motivation.

In other words, it's not that the defendant is harboring the belief that the special agent fabricated the events, but that the acts were lawful acts, and that at least colors the motivation for the letter. I don't know if that's a valid argument or not a valid argument, but that's what I hear.

MR. ARTHUS: I think it would be, first, an extremely tenuous argument based on the discovery that I've seen right now. In fact, I would question, based on the discovery that's been turned over, whether there was even a factual basis for them to make that argument other than some minimizing statements that he had made.

But the man pled guilty. So it's not as though he's taking the position, at any point, that this was not a crime. He pled guilty and served prison time on it.

I do really want to emphasize as well, there are no shared elements between these crimes. There are practically no overlapping witnesses. In fact, there could be no overlapping witnesses if just the certificate of conviction was entered, even assuming that this was lawfully admissible at both trials.

The government has been emphasizing Rule 414, and that

really -- I take a step back, and I try to imagine what the trial would look like in that circumstance, a joint trial, because Rule 414 would only apply to the new child pornography charges, and could actually be introduced as propensity evidence. But on the false information and hoaxes charges, typical Rule 404 would apply, and that could not be considered as propensity evidence. So I understand that limiting instructions are important, but there's a point when they're impossible, and it's impossible to instruct a jury, consider this for propensity, but also not for propensity. You bring in an entire investigation, the government would bring in an entire investigation into the prior child pornography charges, and how a jury could possibly keep track with all these overlapping now factual allegations about what related to the earlier investigation, what related to the new investigation, why they're even hearing about the earlier investigation, whether or not the evidence is even presented in an order where the two cases are done separately, at the very least, I think that this is a circumstance that would call out for a bifurcated trial, even if not a severed trial, if the concern is about jury selection. I would think that you would try one first and then the other. But the overlapping evidence here would be so prejudicial, so inflammatory, a limiting instruction would be so insufficient. Obviously this goes towards later motions in limine, but our position is that the

fact that it's a child pornography conviction would be patently inadmissible at the false information and hoaxes trial. That all speaks towards having these trials separately.

THE COURT: Thank you.

I'm going to reserve on the decision for severance, misjoinder, or the like, or bifurcation until the final pretrial conference in this case, at which point I will have a better understanding of what the evidence at the trial, at any joint trial, a separate trial, would look like. So I'm just going to reserve on that.

I'm happy to be informed otherwise, but it seems to me that what I should do is set a schedule for the government's disclosure of 404(b) evidence, any in limine motions, their pretrial submissions, including proposed voir dire and jury instructions, set a date for that, a date for the defendant to respond and submit any motions that they wish to make, and a response to the defendant's motions by the government, and then a final pretrial conference.

Does the government agree that's the next step here?

MR. BRADLEY: Yes, your Honor. Just mindful of the Court's schedule, would the Court be inclined to set a trial date as well, mindful that there is this severance issue still out there, that would be addressed at the final pretrial conference?

THE COURT: I think I probably would schedule the

final pretrial conference. That's what I probably would do.

And let me hear from Mr. Arthus. Does that sound right?

MR. ARTHUS: It does. Just before we move on from the motions, I think I just need a formal ruling on -- there was a dismissal motion, as well, just to preserve it.

THE COURT: Yes. The basis of the dismissal motion is the facts alleged in the indictment do not amount to a crime, and for much the same reason that I concluded that with respect to reasonable suspicion, that the facts created reasonable suspicion of a violation of the false hoax statute, I also believe the indictment properly charges the crime and that it's a jury question whether or not that crime was committed.

So the motion is denied.

But thank you, Mr. Arthus.

So the government's submissions would be due, unless somebody wants to tell me otherwise, I was thinking of August 4th.

Is that reasonable?

MR. BRADLEY: Yes, your Honor.

THE COURT: All right.

And the defendant's submissions, mindful that everybody is entitled to time, would it be convenient for the defense to get their submissions in September 8th, Mr. Arthus?

MR. ARTHUS: That's fine.

THE COURT: And then with regard to any in limines by the defendant, I want to give the government an opportunity to respond and would make that September 22nd, and then I would ask my deputy to find us a date for the final pretrial conference that would be approximately two weeks after that.

MR. ARTHUS: Just to note, I'm going to be out the first week of October.

THE COURT: Okay. Let's see what we can come up with.

THE DEPUTY CLERK: October 10th, at 11:00 a.m.

THE COURT: Does that work for the government?

MR. BRADLEY: It does, your Honor.

THE COURT: Does that work for you, Mr. Arthus?

MR. ARTHUS: Yes, thank you.

THE COURT: All right. So that will be the date of the final pretrial conference.

And I will hear the government's final motion.

MR. BRADLEY: Thank you, your Honor.

The government would respectfully move to exclude time under the Speedy Trial Act, pursuant to Title 18 of the United States Code, Section 3161(h)(7)(A), between today's date and the date of the final pretrial conference on October 10th of 2023. The government would respectfully submit that the proposed exclusion of time would serve the ends of justice so that the parties can continue reviewing discovery, brief motion practice, and prepare for trial.

MR. ARTHUS: No objection.

THE COURT: I find that the ends of justice will be served by granting a continuance until October 10th and that the need for a continuance outweighs the best interests of the public and the defendant in a speedy trial. The reasons for my finding are that the time is needed to enable the parties to undertake the drafting and filing of the submissions that I have indicated. It may be that, in some instances, time will be excluded by operation of law under the Speedy Trial Act, but for the avoidance of doubt, I will grant the exclusion. I find that it's in the best interests of the public and the defendant to grant that exclusion. And, accordingly, the time between today and October 10, 2023, is excluded under the Speedy Trial Act.

Anything further from the government?

MR. BRADLEY: No, your Honor.

THE COURT: From the defendant?

MR. ARTHUS: No.

THE COURT: Thank you, all, very much.

(Adjourned)